Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-1075 OF 1998
FAIZA TAMBY CHIK J
22 OCTOBER 1998

Civil Procedure *— Injunction — Ex parte injunction — Injunction issued by one High Court restraining proceedings at another High Court — Whether s 54(b) of Relief Act 1950 would apply*

Civil Procedure *— Judgments and orders — Consent order — Consent order approved and perfected by solicitors after injunction restraining proceedings issued — Whether solicitors in contempt of court*

Civil Procedure *— Pleadings — Striking out writ and statement of claim — Application grounded on wrong rule — Whether application to be dismissed in limine — Whether application to specifically state ground relied on under O 18 r 19(1) — Whether grounds under O 18 r 19(1) may used cumulatively — Whether claim clearly unsustainable — Rules of the High Court 1980 O 18 r 19(1)*

Words and Phrases *— 'Frivolous and vexatious' — Rules of the High Court 1980 O 18 r 19(1)(b)*

The plaintiff and the first defendant entered into a building contract in the form prescribed by the Architects Association of Malaysia ('the PAM form of contract'). Disputes arose between the parties and pursuant to cl 34 of the agreement, the disputes were referred to arbitration. Before hearing of the arbitration proceeded, the first defendant filed an originating summons in the Penang High Court ('the first action') for a Mareva injunction against the plaintiff in respect of the contractual retention moneys in the hands of the plaintiff. A consent order was thereafter obtained pursuant to the first action for the retention moneys to be held in a joint account of both solicitors for the plaintiff and defendants pending the outcome of the arbitration. On the morning of the first day fixed for the hearing of the arbitration proceedings at Kuala Lumpur, the plaintiff obtained an ex parte injunction at the Penang High Court pursuant to an originating summons ('the second action') restraining the arbitrator from hearing the case. The plaintiff further asked for the arbitrator to be replaced. The plaintiff subsequently filed the current action in the High Court at Shah Alam ('the third action') and obtained an ex parte injunction, inter alia, to restrain all proceedings in the first and second actions in the Penang High Court. The defendants thereafter filed two applications to strike out the third action. The first application was filed by the first defendant under O 18 r 19, O 12 r 7 of the Rules of the High Court 1980 ('RHC'), the inherent jurisdiction of the court and/or under s 6 of the Arbitration Act 1950. The second application was made by the second defendant and was made pursuant to O 18 r 19, O 12 r 7 of the RHC and/or under the inherent jurisdiction of the court.

Held, dismissing both applications with costs:

(1) The first defendant's prayer for striking out was defective right from its inception. The first defendant prayed for a striking out order under O 12 r 5(7) of the RHC when in fact there is no r 5(7) in existence. There is no provision in the RHC to amend the first defendant's summons in chambers and therefore the prayer was dismissed in limine. The first defendant was further wrong to invoke the summary procedure under O 18 r 19 of the RHC. The summary procedure can only be adopted where it can be clearly seen that the claim or damage is on the face of it clearly unsustainable. The power to strike out any pleadings or any part of a pleading under O 18 r 19 is not mandatory but permissive and conveys a discretionary jurisdiction to be exercised having regard to the quality of and all the circumstances of the plea (see p 634C–D, G–H).

(2) The second defendant had prayed for an order based on para (b) and/or para (d) to O 18 r 19(1) which was contrary to the rules and bad in law. The second defendant could not cumulatively add paras (a), (b), (c) and (d) together as it ran against the explicit provisions of O 18 r 19(2) RHC (see p 634E).

(3) The words 'frivolous and vexatious' refer to cases which are obviously frivolous and vexatious or obviously unsustainable. The pleadings must be so clearly frivolous that to put it forward must be an abuse of the court. In the instant case, the facts pleaded in the statement of claim abundantly disclosed a reasonable cause of action (see pp 634H, 635C).

(4) With regard to the consent order in the first action at the Penang High Court, the said order was approved only after the injunction by the Shah Alam High Court restraining all proceedings in the Penang High Court was issued. There was no final order when the injunction was issued on 27 August 1998. Thus, the solicitors on record then were clearly in contempt in perfecting the said order. Section 54(b) of the Specific Relief Act 1950 did not also apply because the order was not perfected when the injunction was issued, the plaintiff thought no order was made and that it was a mere mutual agreement (see p 636A–D).

[Bahasa Malaysia summary

Plaintif dan defendan pertama telah memasuki satu kontrak bangunan dalam bentuk yang ditetapkan oleh Persatuan Arkitek Malaysia ('borang kontrak PAM itu'). Pertikaian timbul antara pihak-pihak itu dan menurut fasal 34 perjanjian itu, pertikaian itu telah dirujuk kepada timbangtara. Sebelum perbicaraan timbangtara dimulakan, defendan pertama telah memfailkan satu saman pemula di Mahkamah Tinggi Pulau Pinang ('tindakan pertama') untuk satu injunksi Mareva terhadap plaintif berhubung dengan wang tahanan kontraktual yang berada di dalam tangan plaintif. Satu perintah

A persetujuan kemudiannya telah diperolehi berikutan tindakan pertama agar wang tahanan tersebut disimpan di dalam satu akaun bersama kedua-dua peguamcara plaintif dan defendan sementara menunggu keputusan timbangtara. Pada pagi hari pertama perbicaraan prosiding timbangtara itu di Kuala Lumpur, plaintif telah memperolehi satu injunksi ex parte di Mahkamah Tinggi Pulau B Pinang berikutan satu saman pemula ('tindakan kedua') menyekat penimbangtara daripada mendengar kes tersebut. Plaintif selanjutnya telah meminta agar penimbangtara itu digantikan. Plaintiff kemudiannya telah memfailkan tindakan ini di Mahkamah Tinggi di Shah Alam ('tindakan ketiga') dan memperolehi satu injunksi ex parte C antara lain, untuk menyekat semua prosiding di dalam tindakan-tindakan pertama dan kedua itu di Mahkamah Tinggi Pulau Pinang. Defendan-defendan kemudiannya telah memfailkan dua permohonan untuk membatalkan tindakan ketiga. Permohonan pertama itu telah difailkan oleh defendan pertama di bawah A 18 k 19, A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), bidang kuasa D sedia ada mahkamah dan/atau di bawah s 6 Akta Timbangtara 1950. Permohonan kedua telah dibuat oleh defendan kedua dan dibuat menurut A 18 k 19, A 12 k 7 KMT dan/atau di bawah bidang kuasa sedia ada mahkamah.

E **Diputuskan,** menolak kedua-dua permohonan tersebut dengan kos:

(1) Permohonan defendan pertama untuk pembatalan merupakan hak defektif dari mulanya. Defendan pertama memohon untuk satu perintah pembatalan di bawah A 12 k 5(7) KMT di mana tidak wujud k 5(7) itu. Tiada peruntukan di dalam KMT untuk F meminda saman dalam kamar defendan pertama dan oleh demikian permohonan itu telah ditolak secara limine . Defendan pertama seterusnya adalah salah untuk menggunakan prosedur terus di bawah A 18 k 19 KMT. Prosedur terus hanya boleh digunakan di mana adalah jelas dilihat bahawa tuntutan atau ganti rugi itu pada dasarnya jelas tidak dapat diterima. Kuasa untuk G membatalkan apa-apa pliding atau mana-mana bahagian suatu pliding di bawah A 18 k 19 adalah tidak mandatori tetapi permisif dan memberikan satu bidang kuasa budi bicara yang perlu dilaksanakan dengan mengambil kira kualiti dan semua keadaan rayuan tersebut (lihat ms 634C–D, G–H).

(2) Defendan kedua telah memohon untuk satu perintah berdasarkan H perenggan (b) dan/atau perenggan (d) kepada A 18 k 19(1) yang bertentangan dengan aturan tersebut dan salah menurut undang-undang. Defendan kedua tidak boleh secara kumulatif menambah perenggan (a), (b), (c) dan (d) bersama oleh kerana ia bertentangan dengan peruntukan-peruntukan eksplisit A 18 I k 19(2) KMT (lihat ms 634E).

(3) Perkataan-perkataan 'remeh dan menyusahkan' merujuk kepada kes-kes yang nyata remeh dan menyusahkan atau nyata tidak dapat diterima. Pliding-pliding itu mestilah amat jelas remeh

sehinggakan untuk mengemukakannya semestinya merupakan satu penyalahgunaan mahkamah. Di dalam kes ini fakta-fakta yang diplidkan di dalam pernyataan tuntutan jelas mendedahkan satu kausa tindakan yang munasabah (lihat ms 634H, 635C).

(4) Berhubung dengan perintah persetujuan di dalam tindakan pertama di Mahkamah Tinggi Pulau Pinang, perintah tersebut telah diluluskan hanya setelah injunksi oleh Mahkamah Tinggi Shah Alam yang menyekat semua prosiding-prosiding di Mahkamah Tinggi Pulau Pinang dikeluarkan. Tiada perintah muktamad ketika injunksi itu dikeluarkan pada 27 Ogos 1998. Oleh itu peguam-peguam di atas rekod ketika itu dengan jelas telah melakukan penghinaan di dalam menyempurnakan perintah tersebut. Seksyen 54(b) Akta Relief Spesifik 1950 juga tidak terpakai kerana perintah tersebut tidak disempurnakan semasa injunksi itu dikeluarkan, plaintif menyangkakan tiada perintah telah dibuat dan bahawa ia hanya satu perjanjian persefahaman (lihat ms 636A–D).]

Notes

For cases on ex parte injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1954–1974.

For a case on judgments and orders, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2721.

For cases on striking out writ and statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3789–3804.

Cases referred to

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498 (refd)

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Union & Ors [1990] 3 MLJ 231 (refd)

Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393 (refd)

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233 (refd)

Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 (refd)

Legislation referred to

Arbitration Act 1952 s 13(6)

Rules of the High Court 1980 O 18 rr 19(1)(a), (b), (c), (d), (2), O 12 rr 5(7), 7

Specific Relief Act 1950 s 54(b)

Mahadevi Nadchatiram (*Shanti Segaram* with her) (*Mahadevi Nadchatiram & Partners*) for the plaintiff.

RR Sethu (*Lim Hock Siang* with him) (*Azman, Davidson & Co*) for the defendants.

Faiza Tamby Chik J:

Brief facts

The plaintiff and the first defendant have entered into a building contract incorporating the PAM form of contract whereby cl 34 provides for arbitration (see exh CCH-1 in encl 12).

Parties have filed their points of claim/defence and counter claim together with their bundle of documents. Further, the arbitrator has fixed the hearing dates but no hearing has begun yet.

In the meantime, the first defendant filed an originating summons in the High Court at Penang ('the first OS') for a Mareva injunction against the plaintiff pursuant to s 13(6) of the Arbitration Act 1952 in respect of certified sums and retention moneys which are the subject matters of the arbitration proceedings. This is an interlocutory application of the arbitration proceedings made pursuant to the Arbitration Act 1952.

A consent order was entered into pursuant to the first OS for the retention moneys to be held in joint stakeholder account of both solicitors for both parties pending the outcome of the arbitration.

The plaintiff obtained an ex parte injunction at the High Court at Penang pursuant to an originating summons ('the second OS') to restrain the arbitrator from hearing the case on the morning of the first day fixed for the hearing of the arbitration proceedings at Kuala Lumpur.

In the second OS, the plaintiff asked for the arbitrator to be replaced. The plaintiff sweared that they were ready to proceed with arbitration but only wanted to replace the arbitrator (see CCH-20 in encl 12).

This action was then filed and an ex parte injunction was obtained to restrain the ongoing proceedings above.

The second defendant was employed by the first defendant as a consultant engineer for the plaintiff's project. The first defendant was to construct 157 shop units according to the second defendant's design and plans.

The second defendant also signed the Borang E and submitted the same to the Majlis Daerah Kulim when there was no plan in existence (see encl 24 — the affidavit of Khor Kok Thye affirmed on 9 October 1998 in exh 'KKT-2'). Therefore the second defendant owes a fiduciary duty of care to the plaintiff. The second defendant is rightly made a party to these proceedings because he was the structural consultant upon whose judgement the plaintiff relied upon. The design and plans had to be submitted to the Majlis Daerah Kulim in order to enable the first defendant to build.

There are two applications in the instant case. They are in encls 14 and 15.

Enclosure 14 is the first defendant's summons in chamber ('the SIC'). It is made pursuant to O 18 r 19, O 12 r 7 of the Rules of the High Court 1980 ('the RHC'), the inherent jurisdiction of the court and/or under s 6 of

the Arbitration Act 1950. It is supported by the affidavits of Cheah Chin Huat affirmed on 15 September 1998 (encl 17), 11 October 1998 (encl 12) and 23 September 1998 (encl 13). A

Enclosure (15) is the second defendant's SIC. It is made pursuant to O 18 r 19, O 12 r 7 of the RHC and/or under the inherent jurisdiction of the court. It is supported by the affidavits of Cheah Chin Huat affirmed on 15 September 1998 (encl 17), 11 October 1998 (encl 18), 8 September 1998 (encl 12) and 23 September 1998 (encl 13). B

The law

The first defendant is attempting to strike out the plaintiff's writ of summons and statement of claim under O 18 rr 19(b) and (d) of the RHC. This prayer is defective right from its inception. The first defendant's summons in chambers (encl 14) is defective because in the second prayer the plaintiff has prayed for a striking out under O 12 r 5(7) RHC and under O 12 RHC there is no r 5(7) in existence. Therefore the prayer is defective and there is no provision in the RHC to amend the SIC and therefore the prayer is hereby dismissed in limine. In the case of *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775 it was held that the word 'or' appearing between (a), (b) and (c) of O 18 r 19(1) of the RHC is disjunctive in effect. The second defendant when resorting to O 18 r 19(1) must therefore be very specific and must not cumulatively add (a), (b), (c) and (d) together and lump them as one as it would run counter to the explicit provisions of the r 19(2) O 18 RHC. In the instant case the first defendant has prayed for (b) and/or (d) which is contrary to the RHC and therefore the application is bad in law. The plaintiff has instituted this proceeding because the plaintiff was dissatisfied with the reference to arbitration under the PAM contract. It is submitted that the second defendant was the alter ego of the first defendant company and he was also the consulting engineer of the plaintiff's housing development scheme whereby 157 units of shop-houses were being constructed. It is further submitted that the first defendant was the main contractor who was supposed to construct the said shophouses; however the second defendant was appointed by the first defendant but was paid for by the plaintiff. C D E F G

It must be noted that it is wrong for the first defendant to invoke the summary procedure under O 18 r 19 RHC. It can only be adopted where it can be clearly seen that the claim or damage is on the face of it is clearly unsustainable. The power to strike out any pleadings or any part of a pleading under O 18 r 19 is not mandatory but permissive and conveys a discretionary jurisdiction to be exercised having regard to the quality of and all the circumstances of the offending plea. The first defendant has raised in sub-s (b) and/or (d) of O 18 r 19(1) the words 'frivolous and vexatious' which refer to cases which are obviously 'frivolous and vexatious' or obviously unsustainable. The pleadings must be so clearly frivolous that to put it forward must be an abuse of the process of the court. In the case of *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Union & Ors* [1990] 3 MLJ 231, Edgar Joseph Jr J held at p 239 that: H I

> By the words 'frivolous and vexatious' are meant cases which are obviously frivolous and vexatious or obviously unsustainable. The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the court.

As can be observed from the statement of claim, on 5 June 1997 the said works were still not completed and as a result the plaintiff suffered loss and damage under the agreement dated 1 June 1994 amounting to RM3,000 per day from 14 December 1995 to 5 June 1997 which amounts to RM1.617m and rectification works worth RM300,000.

The principles governing the application made under O 18 r 19(1) RHC are well settled that it is only in plain and obvious cases that the judge can say at once that the Statement of Claim as it stands it is insufficient even if proved to entitle the plaintiff to the relief of which he asks for (see *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498). In the instant case, the facts pleaded in the Statement of Claim abundantly disclosed a reasonable cause of action.

It is observed that in the Penang High Court in the first originating summons vide OS No 24–509–1998, the first defendant applied for a Mareva injunction and the plaintiff obtained an injunction in this court to stay this originating summons.

The second originating summons vide OS No 24–670–1998 was by the plaintiff in order to stop the arbitration proceedings and to remove the arbitrator. The ex parte injunction had lapsed and the proceedings had not commenced. The arbitration proceedings had also not commenced. In *Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 it was held at p 249 that:

> As the cause of the action in the present suit and that in the other suit were different, there was no 'cause estoppel' and as the issues were also different there was no 'issue estoppel'. Further, even though issue estoppel and re judicata were pleaded in the defence against the second and third plaintiffs, the question of tortious misrepresentation was not even raised or decided in the other suit and the defendant did not produce any court records thereof. Thus, res judicata giving rise to an estoppel did not arise. Even if various pleas on estoppel and res judicata could validly be raised in the present circumstances, as justice prescribes that the res judicata or the estoppel principles should not be applied on a party who has suffered from the alleged conduct of another, the plaintiffs should not be prevented or shut out from reopening the issue when it later arose in the proceedings.

The plaintiff in its claim before the court has requested that the arbitration proceedings be cancelled and that this court hear this case and set this matter down for trial as there are triable issues. In the case of *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393 it was stated at p 394 that:

> Once the court below is satisfied that there is a bona fide allegation of fraud against the appellants, ... then the discretion given to the judge under s 25(3) of the Arbitration Act 1952 was indeed properly exercised.

As to the question of forum shopping raised by the first defendant it is observed that both the defendants have indirectly submitted to the jurisdiction of this court by filing the numerous affidavits.

The Penang High Court consent order

As regards the Penang High Court consent order it can be seen in encl 9 of the affidavit of Khor Kok Thye affirmed on 12 September 1998 at exh 'KKT-3' that the draft consent order was executed according to the letter dated 1 September 1998 of M/s Annamalai & Co. The defendants' solicitors in the Penang High Court were M/s Presgrave & Matthews. The draft order was approved only after the injunction was served on 28 August 1998. There was no final order when this court issued the injunction on 27 August 1998. The defendants' solicitors in Penang and the plaintiff's previous solicitors hurriedly approved the said draft order in contempt of the order granted by the Shah Alam High Court which restrained all proceedings in the Penang High Court. The draft order and the letters in exh 'KKT-3' of encl 9 clearly showed that they acted in contempt in perfecting the order dated 20 July 1998. Consequently s 54(b) of the Specific Relief Act 1950 does not apply here because the order was not perfected when the injunction was issued and the plaintiff thought that no order was made and that it was a mere mutual agreement.

Moreover in encl 9 at exh 'KKT-5', the plaintiff's solicitors in the High Court at Penang by the letter dated 20 August 1998 made no reference to any order of court but referred to the proceedings and the mutual agreement between the plaintiff's Penang solicitors and the defendant's Penang solicitors without reference to any order of court.

It is observed that exh 'KKT-3' of encl 9 of the draft order exhibited showed that it was dated 20 June 1998 and the said draft order did not carry the notice under O 45 r 7 RHC but the perfected order carried the said notice. The perfected order was dated 20 July 1998 and the draft order was dated 20 June 1998. Therefore there are two conflicting orders on two conflicting dates which are inconsistent with each other.

For these reasons, the two applications, in encls 14 and 15 are therefore dismissed with costs.

Applications dismissed with costs.

Reported by Andrew Christopher Simon